TENAGA NASIONAL BERHAD
(Formerly Lembaga Letrik Negara Tanah Melayu)

v.

PERWAJA STEEL SDN BHD
(Formerly Perwaja Terengganu Sdn. Bhd.)

HIGH COURT, KUALA LUMPUR
TUAN LOW HOP BING J
[CIVIL SUIT NO. D2-22-1037 OF 1992]
15 AUGUST 1995

CONTRACT: *Contract - Supply and consumption of electricity - Plaintiff sending bills with credit notes for 20% Government discount - Reliance on credit notes - Payment by defendant - Discount withdrawn as at January 1990 - Notice to defendant delayed - Plaintiff claiming full rate retrospectively - Defendant selling steel billets - Prices influenced by expenditure on electricity - Alteration of defendant's position - Defence of estoppel - Whether any merits.*

The parties had entered into a contract for the supply and consumption of electricity. By a letter dated 11 March 1987, the Ministry of Trade and Industries Malaysia (MTI) confirmed the grant to the defendant of a 20% Government discount on all electricity bills from the plaintiff effective from 1 February 1987. Thereafter, payments were made in reliance upon the electricity bills and 20% credit notes which the plaintiff duly acknowledged. Prices of steel billets, as approved by the Government, which were sold by the defendant were also influenced by the defendant's monthly expenditure on electricity. The plaintiff was subsequently instructed by MTI to discontinue the 20% discount with effect from 1 January 1990 but the defendant was only informed of the same by letter dated 24 July 1990. Nevertheless, a restrospective claim on the full rate of the bills was made by the plaintiff. The defendant raised the defence of estoppel and filed a counterclaim.

The issue was whether there were merits to the defence.

Held:

[1] It is the plaintiff's obligation and legal duty to send correct electricity bills and 20% discount credit notes to the defendant. The plaintiff at all material times knew that the defendant would rely upon these bills and credit notes to make payment. The defendant is now not only unable to go back to the Government for a review of the prices of the steel billets, it is also impossible for the defendant to claim any price variations from its customers.

[2] The notification to the defendant purporting to withdraw 20% discount already given by monthly credit notes duly signed and authenticated by the plaintiff's authorised officers cannot now be withdrawn retrospectively. The plaintiff had reconfirmed by their letter dated 24 July 1990 that they had been instructed by MTI to discontinue the 20% discount with effect from 1 January 1990 and therefore it does not lie in the mouth of the plaintiff to now deny and contradict its own letters, documents and discount credit notes.

[3] To date the plaintiff has not cancelled any of its discount credit notes nor raised any debit notes in its place. Therefore the 20% discount credit notes given by the plaintiff to the defendant continues to be valid, accurate, binding and irrevocable. In the circumstances, the defence of estoppel succeeds and the plaintiff is estopped from enforcing its claim.

[Plaintiff's claim dismissed with costs. Defendant's counterclaim struck out].

Cases referred to:
Sim Siok Eng v. Government of Malaysia [1978] 1 MLJ 15 ***(refd)***
Birmingham and District Land Company v. London and North Western Railway Company [1889], 40 Ch.D. 268 ***(cit)***
Salisbury (Marquess) & Anor. v. Gilmore & Anor. [1942] 2 KB 38; 2 All ER 457 ***(cit)***
The "Shackleford" [1978] 2 Llyod's Rep. 154 ***(cit)***
The "Post Chaser" [1981] 2 Lloyd's Rep. 695 ***(cit)***
W.J. Alann & Co. Ltd. v. 1 Nasr Export and Import Co., [1972] 1 Lloyd's Rep. 313; [1972] QB 189 ***(refd)***
MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun & other appeals [1995] 2 MLJ 493 ***(refd)***
Vadivelu Thevar v. State of Madras AIR [1957] SC 614 ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 101(1), 101(2)
Evidence Act 1950 (Act 56), s. 115
Evidence Act 1872 (India), s. 134

For the appellant - Muhammad Nur Azmi (PH Goh with him); M/s. Bakar, Khalil & Partners
For the respondent - V K Lingam (Subasini Muniandy with him); M/s. V. K. Lingam & Co.

JUDGMENT

Low Hop Bing J:

In this suit, the plaintiff's claim against the defendant is for a sum of RM13,127,331.79 together with interest thereon at the rate of 8% per annum from 1 September 1990 till the date of judgment and thereafter until the date of realisation. The claim is contested by the defendant who has also filed a counterclaim for the same amount.

The plaintiff's claim purportedly arose from the 20% discount given to the defendant in respect of the supply and consumption of electricity at its Steel Mill Plant in Kemaman, Terengganu Darul Iman for the period from February 1988 till 31 December 1989.

The plaintiff and the defendant had executed contract No. 383/85 ("the Contract") for the supply and consumption of electricity, pursuant to which the defendant was required to pay electricity bills within thirty days of receiving the bills together with discount notes, from the defendant, otherwise the plaintiffs will disconnect the electricity supply to the defendant's premises.

By letter dated 11 March 1987, the Ministry of Trade and Industries Malaysia ("MTI") confirmed with the defendant that 20% Government discount on all electricity bills given to the defendant by the plaintiff has been granted with effect from 1 February 1987. For the purposes of the implementation of the discount, the defendant was asked to contact the plaintiff. This is evidenced by the material paragraph of the letter which reads as follows:

> Kementerian Tenaga, Telekom dan Pos telah seterusnya bersetuju supaya Syarikat Perwaja Terengganu Sdn. Bhd. diberi diskaun sebanyak 20% ke atas bil elektrik bulanan (Kem. LP. 13) di tapak kilangnya bertempat di Kawasan Perusahaan Telok Kalong, Kemaman, Terengganu berkuatkuasa mulai 1 Februari 1987. Sila tuan berhubung dengan pihak Lembaga Letrik Negara di tempat tuan supaya diskaun ini dapat dilaksanakan.
>
> (Translation: The Ministry of Energy, Telecommunications and Posts has thereby agreed that the Company Perwaja Terengganu Sdn. Bhd. be given discount at 20% on monthly bills (Kem. LP. 13) at its factory site situated in the Telok Kalong Industrial Area, Kemaman, Terengganu with effect from 1st February i987. You are requested to contact the National Electricity Board in your area so that the discount can be implemented).

Pursuant to the contract, the plaintiff sent to the defendant the respective monthly electricity bills, credit notes for 30% discount, credit notes for 20% discount and covering letters confirming the amounts under the electricity bills, the amount of 30% discount, the amount of 20% discount and the amount to be paid. The 30% discount is not an issue here. As stated above, the dispute is confined to the 20% discount only.

In my judgment, it is the plaintiff's obligation and legal duty to send correct electricity bills and 20% discount credit notes to the defendant. The plaintiff at all material times knew that the defendant would rely upon these bills and credit notes to make payment. These bills and credit notes were signed by authorised officers of the plaintiff, as confirmed by the evidence of PW1 who is the district manager for Kemaman. However, under cross-examination, he has categorically stated that he has no knowledge concerning the issue of 20% discount as all these matters were handled by the plaintiff's head office in Kuala Lumpur. He only followed directions from the head office in Kuala Lumpur. In light of his ignorance, his evidence did not assist the plaintiff in establishing its claim against the defendant.

PW2 is the accountant for the plaintiff. He testified under cross-examination that he is not competent to comment on the letter written by Mr. K.M. Loke, the chief accountant of the plaintiff.

Under s. 101(1) of the Evidence Act 1950, whoever desires the Court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist. In other words, the plaintiff must prove such facts as the plaintiff desires the Court to give judgment as to its right to claim against the defendant or defendant's liability to pay the plaintiff. The burden of proof is on the plaintiff: s. 101(2). In order to succeed here, the plaintiff must prove its claim affirmatively.

On the other hand, in the statement of defence, the defendant raised the defence of estoppel. Hence, it is necessary to consider if this defence applies here and if so, whether there are merits in this defence.

The defendant had, in reliance upon the plaintiff's monthly electricity bills, the 20% credit notes and the covering letters, been induced thereby, and as a result therefrom, had settled all the electricity bills, which the plaintiff had acknowledged and then issued a covering letter to that effect, without any objection, condition or reservation as full and final settlement thereof. The plaintiff had led the defendant to believe that all the monthly electricity bills and credit notes issued by them were valid, unconditional, binding and irrevocable. The defendant had sought the Government's approval on the prices of steel billets manufactured by the defendant, on the basis of the costs incurred by the defendant. DW1's evidence confirmed that besides the price of scrap metal, the next most important expenditure incurred as the costs for the manufacture of steel billets was based on electricity bills. Hence, the prices of steel billets as approved by the Government were based, *inter alia*, on the defendant's payment of monthly electricity bills and discount credit notes sent by the plaintiff. The steel billets have already been sold to the customers based on the electricity bills after deducting the discount credit notes. Therefore the defendant was induced by the plaintiff to alter its position to its detriment. It is impossible for the defendant to go back to the Government and ask for retrospective review of the prices for the steel billets as the defendant is estopped from doing so. It is also impossible for the defendant to recover the price difference from the customers to whom the steel billets were sold, as the defendant is again estopped from claiming the difference.

The plaintiffs had at all material times also represented, reconfirmed and reassured the defendant that the 20% discount credit notes issued for the period February 1988 to 31 December 1989 were valid, accurate, binding and irrevocable. This is confirmed in paragraphs 2 and 6 of the plaintiff's letter dated 24 July 1990, addressed to the defendant which read as follows:

> Para. 2: Seperti yang diarahkan oleh Kementerian Perdagangan dan Perindustrian, Diskaun Kerajaan sebanyak 20% telah diberhentikan mulai dari Januari 1990. Adalah diperhatikan bahawa tuan telah berterusan mengurangkan 20% daripada bil elektrik mulai Januari hingga Mei 1990 tanpa apa-apa persetujuan daripada LLN. Dengan memasukkira denda bayar lewat untuk bil bulan Oktober 1989 berjumlah $10,731.79, jumlah yang belum dijelaskan telah meningkat kepada $5,597,861.40.
>
> (Translation: As directed by the Ministry of Trade and Industries, Government discount at 20% was discontinued with effect from January 1990. It is noted that you had continued to deduct the 20% from all electricity bills from January to May 1990 without any consent from NEB. After taking into account the penalty for late payment of the bill for the month of October 1989 amounting to $10,731.79, the total outstanding amounts to $5,597,861.40).
>
> Para. 6: ... LLN telah meminta supaya perkara ini diselesaikan pada penghujung bulan ini. LLN akan juga meminta Perwaja Steel Sdn. Bhd. membayar bil bulan Jun 1990 dan bil-bil bulan depan dalam masa yang ditetapkan tanpa mengurangkan 20% diskaun Kerajaan yang telah diberhentikan kepada syarikat tuan mulai Januari 1990.
>
> (Translation: NEB requested that this matter be settled before the end of this month. NEB will also request Perwaja Steel Sdn. Bhd. to pay the bill for June 1990 and the bills for the coming months without deducting the 20% Government discount to your company which has been discontinued from January 1990).

It is clear from the above that the plaintiff was instructed by MTI to discontinue the 20% discount only with effect from January 1990 whereas the letter in question was dated 24 July 1990. It is my considered view that the defence of estoppel raised by the defendant has merits, and is supported by s. 115 of the Evidence Act 1950 (Act 56) which reads as follows:

> When one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, otherwise than but for that belief he would have acted, neither he nor his representative in interest shall be allowed in any suit or proceeding between himself and that person or his representative in interest to deny the truth of that thing.

The law of estoppel is clearly set out in *Sim Siok Eng v. Government of Malaysia* [1978] 1 MLJ 15 wherein Lee Hun Hoe CJ. said:

> ...the equitable principle stated by Lord Cairns in *Hughes v. Metropolitan Railway Co.* [1877], 2 App. Cas.439 at page 448 in these words:
>
> > ... It is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results - certain penalties or legal forfeiture - afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties.

See also *Birmingham and District Land Company v. London and North Western Railway Company* [1889], 40 Ch.D. 268; *Salisbury (Marquess) & Anor. v. Gilmore & Anor.* [1942]

2 KB 38; 2 All ER 457; *The "Shackleford"* [1978] 2 Llyod's Rep. 154; *The "Post Chaser"* [1981] 2 Llyod's Rep. 695.

It is inequitable for the plaintiff as the promisor/representor to go back on the promise or representation and this was held in the case of *W.J. Alann & Co. Ltd. v. 1 Nasr Export and Import Co.*, [1972] 1 Lloyd's Rep. 313; [1972] 2 QB 189. Lord Denning, M.R. stated that the representor will not be allowed to enforce his rights where it would be inequitable having regard to the dealings which have thus taken place between the parties.

The former general manager of finance and account of the defendant (DW1) had given evidence that he was personally responsible and in charge of payments of the defendant's monthly electricity bills after taking into account the discount credit notes. He testified that he and the defendant had relied and acted upon these monthly electricity bills and the discount credit notes and he was induced by the plaintiff's documents to make the monthly payments in full and final settlement of the electricity charges. He also confirmed that the defendant had relied upon the monthly discounted electricity bills in ascertaining the price of its steel billets and thereafter submitting its proposal to the Government for the price approvals of its steel billets which had already been sold to the customers. In my judgment the defendant is not only unable to go back to the Government for the review of the prices of the steel billets, it is also impossible for the defendant to claim any price variations from its customers. He explained that it is the responsibility of the plaintiff and MTI to inform the defendant in advance by reasonable notice before discontinuing the 20% discount which has directly affected the defendant in its budget and consequently the pricing of its steel billets. The evidence of DW1 was uncontradicted and unchallenged by the plaintiff. DW1's credibility and quality in his evidence completely outweighs the plaintiff's evidence. In *MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun & other appeals* [1995] 2 MLJ 493 at 519, Sri G. Ram, JCA in the Court of Appeal held that:

> In addition to the decisions cited by Counsel, I would also refer to s. 134 of the Evidence Act, 1950 which is, in my opinion, relevant to the point under consideration. That section is in the following terms:
>
> No particular number of witnesses shall in any case be required for the proof of any fact.

In *Vadivelu Thevar v. State of Madras* AIR [1957] SC 614, Sinha J. when delivering the unanimous decision of the Supreme Court in India, elucidated on the law as enacted in s. 134 of the Indian Evidence Act 1872 (which is in *pari materia* with our s. 134), and said at p. 619:

> The section enshrines the well-recognized maxim that "evidence has to be weighed and not counted". Our Legislature has given statutory recognition to the fact that administration of justice may be hampered if a particular number of witnesses were to be insisted upon.

The notification to the defendant dated 29 August 1990 and 31 May 1991 purporting to withdraw 20% discount already given by monthly credit notes duly signed and authenticated by the plaintiff's authorised officers cannot now be withdrawn retrospectively. The plaintiff had already reconfirmed by their letter dated 24 July 1990 that they had been instructed by MTI to discontinue the 20% discount with effect from 1 January 1990 and therefore it does not lie in the mouth of the plaintiff to now deny and contradict its own letters, documents and discount credit notes. To date the plaintiff has not cancelled any of its discount credit notes and neither has it raised any debit notes/invoice in place of the credit notes. Therefore the 20% discount credit notes given by the plaintiff to the defendant continues to be valid,

accurate, binding and irrevocable. In the circumstances, the defence of estoppel succeeds and the plaintiff is estopped from enforcing its claim, with the result that the plaintiff's claim fails and is hereby dismissed with costs.

Since the plaintiff's claim does not succeed, the defendant is withdrawing its counterclaim. In the circumstances, I strike out the said counterclaim with costs.